NO. 48324-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAMIEN RAPHAEL DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Michael E. Schwartz

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED DAVIS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

a. Standard of Review

This Court established that "under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 519-20, 228 P.3d 813 (2010), *review denied*, 170 Wn.2d 1003 (2010)(citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Hodges*, 118 Wn. Appl 668, 673-74, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Venegas*, 155 Wn. App. at 520 (citing *Weber*, 159 Wn.2d at 279).

b. The trial court erred in instructing the jury on general knowledge without instructing the jury on knowledge and defense counsel was ineffective in failing to propose an instruction on knowledge.

The State mischaracterizes appellant's argument, claiming that "Defendant Davis asserts that the trial court erred in giving its instruction regarding knowledge of an accomplice." Brief of Respondent at 51. As argued in appellant's opening brief, the trial court erred in giving the general knowledge instruction without giving the knowledge instruction and

consequently when read as a whole, the jury instructions did not completely inform the jury of the applicable law pertaining to knowledge. Brief of Appellant at 26-30. Appellant correctly cites and discusses the State's proposed instruction on general knowledge which is Jury Instruction 23. CP 77. The court gave the general knowledge instruction proposed by the State. CP 280 (Jury Instruction 20). The court's error in giving the State's tailor-made general knowledge instruction without giving the knowledge instruction failed to fully instruct the jury on the element of knowledge thereby relieving the State of its burden to prove every element beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995).

The State argues further that defense counsel was not ineffective where the knowledge instruction would have been inconsistent with the defense theory that "Davis had tried to sabotage the robbery plan, not that he lacked knowledge." Brief of Respondent at 55-57. To the contrary, defense counsel argued throughout closing argument that Davis did not aid in the commission of the robbery where he only gave some information. RP 1869, 1874-76. He told the jury that merely giving information is insufficient because the jury must find that Davis "gave that information to facilitate, to aid that robbery, and that's not what occurred." RP 1875. He argued that Davis gave up the information at the behest of Marcus Reed and

Daniel[1] but was not aiding and abetting. RP 1876. If the jury had been instructed on knowledge, defense counsel could have argued that even if Davis gave information that would lead a reasonable person in the same situation to believe that he was aiding in a crime, the jury is permitted but *not required* to find that he acted with knowledge.

c. The prosecutor committed repetitive misconduct by misstating the law, improperly applying the puzzle analogy to reasonable doubt, and impugning defense counsel during closing argument.[2]

The State argues that when the prosecutor told the jury that "if Damien Davis and Marcus Reed were party to a robbery, they are guilty of the charged offenses here," it is clear that the prosecutor was making a factual argument, not a legal argument, when taken in context. Brief of Respondent at 60-61. The record belies the State's argument. When taken in context, the prosecutor was absolutely making a legal argument where he continued to argue, "What does it mean to be party to a robbery? We are going to talk about that, but I want to first discuss what this case is not about. I said to you the central issue here is whether or not these people were

[1] For clarity and consistency, Daniel Davis will be referred to as Daniel and Damien Davis will be referred to as Davis.

[2] The State urges using the term "prosecutorial error" rather than prosecutorial misconduct, but the Washington Supreme Court rejected the same argument in *State v. Ish*, 170 Wn.2d 189, 209, 241 P.3d 389 (2010)("While certainly some errors are unintentional and some instances of prosecutorial misconduct are more egregious than others, we decline to start drawing fine lines between error and misconduct.")

involved in a robbery." RP 1788. The prosecutor referred to the jury instructions which instructs the jury on the law and he told the jury that "it doesn't matter legally" who the shooter was. RP 1788. The prosecutor misstated the law.

The State also argues that the prosecutor did not misstate the law in arguing that Kelsey Kelly and Kathy Devine were victims of assault because they saw Daniel and Reed barge into the room and shoot Donald Philly, mistakenly relying on *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009). Brief of Respondent at 62-63. In *Asaeli*, the defendant intentionally shot into a car multiple times, shooting the driver while a passenger was in the back seat. The passenger saw at least two bullets come through the windshield and she laid down in the back seat after the defendant started shooting. Although the passenger did not testify that she was afraid she would be injured, this Court held that the fact that she was aware of the gunfire and took the only cover she could "creates a very strong inference that the shooting created an apprehension and imminent fear of bodily injury." *Asaeli*, 150 Wn. App. at 581-82. Contrary to the State's argument, this Court's holding does not establish that anytime a person shoots "someone in the presence of someone else," he creates apprehension and imminent fear of bodily injury in that person.

Furthermore, unlike in *Asaeli*, the facts here do not substantiate any inference that the shooting created an apprehension and imminent fear of bodily injury. The State claims that Kelly testified that she was scared, she fled into the bathroom, and property was demanded of her, and that Devine testified that she was scared, she had a gun pointed at her, and she stated that she was worried she would get shot. Brief of Respondent at 63, citing RP 334-35, 445-46, 486. The record reveals that the State's interpretation of the facts is inaccurate. Kelly did not see the gun, she did not see the people who opened the door, she ran into the bathroom, and one person came in and "asked" her where everything was at and she said she did not know. RP 333-34. Devine testified that the gun was "like pointed at me, but not pointed at me." RP 445. She was scared because "[t]he one guy still had a gun pointed" at Mark McGlothlen. RP 446. Devine said she was worried she was going to get shot because she "asked them" to shoot her. RP 486.

The State argues next that the prosecutor "did not equate solving a certain percentage of a puzzle with being convinced beyond a reasonable doubt, and therefore, never misstated the law or minimized his burden of proof." Brief of Respondent at 68-69, citing *State v. Fuller*, 169 Wn. App. 797, 282 P.3d 126 (2012) and *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496, *review denied*, 172 Wn.2d 1012 (2011). Importantly, the State fails to

explain the need for a puzzle analogy in light of the Washington Supreme Court's holding in *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 1241 (2007), that WPIC 4.01 adequately instructs the jury on reasonable doubt and permits both the government and the accused to argue their theories of the case. *Bennett* underscores that ordinary jurors would sufficiently understand proof beyond a reasonable doubt by following the instruction. As argued in appellant's opening brief, this Court should abolish the puzzle analogy completely because it is unnecessary, distracts the jury, and does not further the ends of justice.

The State argues further that the prosecutor did not disparage defense counsel because arguing that "the defense theories should be rejected" is appropriate on rebuttal. Brief of Respondent at 71. The State's argument would make sense if that was what the prosecutor actually argued. However, the record reflects that the prosecutor argued that everyone is entitled to a vigorous representation, but "don't confuse vigorous advocacy with there being any merit to what Ms. Ko and Mr. Underwood said to you during their comments." RP 1878. By insinuating that the job of defense counsel is to be a vigorous advocate and make meritless arguments, the prosecutor improperly disparaged and impugned their integrity. "[P]rosecutors would best serve the criminal justice system by purging

language expressing their personal thought process from the courtroom." *State v. Jackson*, 150 Wn. App. 877, 899, 209 P.3d 553 (2009).

d. The trial court abused its discretion by admitting Daniel's recorded statement as a prior consistent statement based on its erroneous view of the law.

The State misapprehends *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004), in arguing that the trial court properly exercised its discretion in admitting Daniel's prior statement. Brief of Respondent at 38-43. In *Thomas*, the Washington Supreme Court explained when ER 801(d)(1)(ii) is triggered:

> If there is an inference raised in cross examination that the witness changed her story in response to an external pressure, then whether that witness gave the same account of the story prior to the onset of the external pressure becomes highly probative of the veracity of the witness's story given while testifying. Accordingly, the proponent of the testimony must show that the witness's prior consistent statement was made *before* the witness's motive to fabricate arose in order to show the testimony's veracity and for ER 801(d)(1)(ii) to apply.

Thomas, 150 Wn.2d at 865 (emphasis added by the court)(internal citations omitted).

Unlike in *Thomas*, where there was no evidence that the defendant had a motive to fabricate when he made the prior consistent statement, Daniel admitted at trial that he had a motive to lie at the interview. RP 839, 991, 995. *See* Brief of Appellant at 46-47. Consequently, the State has

failed to show that Daniel's recorded statement was made *before* his motive to fabricate arose and therefore ER 801(d)(1)(ii) does not apply.

Moreover, the Supreme Court cited *State v. McDaniel*, 37 Wn. App. 768, 683 P.2d 231 (1984), with approval. *Thomas*, 150 Wn.2d at 865. In *McDaniel*, the Court recognized that prior out-of-court statements are not admissible to reinforce or bolster trial testimony because repetition generally is not a valid test of veracity. *McDaniel*, 37 Wn. App. at 771 (citing *Thomas v. French,* 99 Wn.2d 95, 659 P.2d 1097 (1983); *State v. Harper*, 35 Wn. App. 855, 670 P.2d 296 (1983)). The Court concluded that there was no showing that the victim's consistent statements were made at a time when the motive to falsify was not present. In reversing the convictions, the Court held that evidence which merely showed that the victim made similar prior statements was of little probative value and should not have been admitted as prior consistent statements under ER 801(d)(1)(ii). *Id.*

e. The trial court exceeded its authority by entering findings of fact and conclusions of law for a 3.5 hearing held by a predecessor judge.

The State makes arguments which are not on point but does not dispute that the trial court had no authority to enter findings of fact and conclusions of law for a 3.5 hearing held by a predecessor judge. Brief of Respondent at 19-21. As argued in appellant's opening brief, the trial court

did not have authority to enter findings of fact on the basis of a hearing held by a predecessor judge, it did not make the findings of fact based on the entire original record, the findings and conclusions did not comport with the predecessor judge's oral ruling, and this disqualification cannot be waived pursuant to RCW 2.28.030 which states that disqualifications may be waived by the parties only in cases specified in subsections (3) and (4). *See* Brief of Appellant at 50-56.

f. Reversal is required because cumulative error deprived Davis of his constitutional right to a fair trial.

The record establishes that reversal is required because the accumulation of errors denied Davis his constitutional right to a fair trial and the presumption of innocence: 1) the trial court erred in instructing the jury on general knowledge without instructing the jury on knowledge; 2) defense counsel was ineffective in failing to propose an instruction on knowledge which would have been helpful to Davis's defense; 3) the prosecutor committed misconduct by misstating the law, improperly applying the puzzle analogy to reasonable doubt, and impugning defense counsel during closing argument; 4) defense counsel was ineffective in failing to object to the prosecutor's misstatements of the law; 5) the trial court abused its discretion by admitting Daniel's recorded statement as a prior consistent statement based on its erroneous view of the law; and 6) the

trial court exceeded its authority by entering findings of fact and conclusions of law for a 3.5 hearing held by a predecessor judge.

Reversal is required because a trial rife with error does not constitute a fair trial, guaranteed under the Sixth Amendment of the United States Constitution and article I, section 21 of the Washington Constitution. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009).

2. DAVIS'S ASSAULT CONVICTIONS MUST BE REVERSED AND DISMISSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT HE ASSAULTED KATHY DEVINE AND KELSEY KELLEY.

The State's argument that when viewed in the light most favorable to the State, there was sufficient evidence to find Davis guilty of the assault charges is unsubstantiated by the record. Brief of Respondent at 49-50, citing RP 332-35, 338, 445-46, 486.

The State's claim that Kathy Devine testified that "the gun was pointed directly at her," mischaracterizes Devine's testimony where she had difficulty explaining where the gun was pointed:

Q. What's this man doing with the gun at the time?
A. It's like pointed at me, but not pointed at me.
Q. Can you explain that to me?
A. It's like it was pointing it at me, but not. It's kind of hard.
Q. Now is he --
A. I don't know if he was meaning to, but it was pointed at me.
Q. And how?
A. And he was more concerned about getting the stuff and getting out of the room.

RP 445.

The State claims that Devine stated "she was scared," but omits the fact that she explained she was scared because the shooter still had a gun pointed at Mark McGlothlen. RP 446. The State also claims that Devine "specifically stated she was scared she was going to get shot, too," but omits the fact that the reason Devine was worried she would get shot is because she asked them to shoot her. RP 486.

The State makes similar unsubstantiated claims about Kelsey Kelly's testimony. The State claims Kelly saw Phily get shot and immediately fled into the bathroom "out of fear," but Kelly actually testified that she ran to the bathroom because "[t]here was no where else to run." RP 335. The State also claims that someone with a gun entered the bathroom and made a "demand" of Kelly, but she actually testified that the person came in "asking" her where everything was at. RP 335.

Reversal is required because even when admitting the evidence as true and drawing all reasonable inferences therefrom while viewing the evidence in the light most favorable to the State, there was insufficient evidence to prove the essential elements of assault in the second degree beyond a reasonable doubt. *See* Brief of Appellant at 19-26.

3. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE DAVIS REMAINS INDIGENT.

Appellant filed a motion on June 27, 2016, requesting that this Court exercise its discretion and not award costs in the event the State substantially prevails on appeal because the trial court found that he is indigent and he is presumably still indigent. This Court should consider the motion as a supplement to appellant's opening brief. There is no prejudice to the State because it has addressed the issue in its response. Brief of Respondent at 83-85.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Davis's convictions.

DATED this 15th day of December, 2016.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Damien Raphael Davis

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office and Catherine Glinkski, attorney for Marcus Reed.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of December, 2016.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

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